

## **Participation and Regulation: where two worlds collide?**

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### **Abstract**

Regulatory regimes to ensure environmental protection have been constructed through a combination of political and technical deliberation, the end-point of which is generally a set of criteria for decision-making aimed at controlling specific substances with known or suspected impacts on the environment or human health. Regulatory decision-making in the form of licensing site operators is thus one stage in a series of decision-making processes, being preceded by: European and national legislation; the development of technical standards, procedural guidance and regulations; and, in many cases, by planning decisions which determine the location of a proposed facility. While this legacy has its advantages, these constraints on regulatory decisions sometimes sit uneasily with the growing emphasis on ensuring the active involvement of stakeholders and the wider public in environmental decision making. This paper discusses the findings of a research project carried out to assist an environmental regulator, the Scottish Environment Protection Agency (SEPA), improve its consultation processes to make them more accessible and transparent. The research addressed the question of how the ideals of participation fare when they come into contact with a tightly-constrained decision-making process, and at how individuals working at the interface between the two have attempted to reconcile them. It led to a set of recommendations as to how SEPA can build on experience within the organization and from other regulators to develop a set of corporate principles for public involvement, together with a toolkit to support staff applying them.

### **Introduction**

This paper considers the tensions between aspirations for greater public involvement and the often constrained decision-making processes set out by environmental regulations. Despite a vast quantity of literature on public involvement (spanning provision of environmental information to active participation in decision making and implementation), there is very little literature that addresses public involvement in decisions of a regulatory kind. In the view of the authors, much of the good practice guidance on public involvement is less appropriate for these purposes. This is due to fundamental differences between the context, timing and scope of regulatory decision making processes on the one hand, and more open-ended planning or consultative processes on the other. This paper considers how regulatory requirements and a desire for greater public involvement can be reconciled in the context of the work of a regulatory agency, the Scottish Environment Protection Agency (SEPA).

The paper is based on research commissioned by SEPA, which was carried out by researchers at the Macaulay Institute and University of Dundee from January to March 2006. The aim of the project was to identify good practice in involving stakeholders and/or the public in regulatory decisions, from the perspective of, and based on, the experience of staff in SEPA and other regulatory agencies. In particular, the research aimed to identify and compare the baselines for public involvement across the different regulatory regimes under which SEPA operates (see appendix one); to set out the perceived constraints on public involvement in regulatory decision-making; to explore how regulatory staff currently reconcile the ideals of participation with regulatory regimes; and to make recommendations as to how SEPA can improve its current practices whilst still meeting legislative requirements. The methodology consisted of a legal review of the regulatory obligations; an analysis of good practice (from published reports); an analysis of current practice (from 14 in-depth interviews with staff from SEPA and other regulatory agencies) and a synthesis of the legal and current practice findings. For further details on the research, see (Blackstock et al. 2006).

### **In what sense do the worlds of participation and regulation collide?**

In the literature on participatory approaches in decision-making, the emphasis tends to be on isolated decision-making contexts, where the aim is to involve a wide range of people as meaningfully as possible in reaching and implementing a given decision. From such a perspective, it is desirable to involve people at the earliest possible opportunity, in order to ensure that they are able to influence the framing of the decision and the options under consideration. Such isolated contexts seldom if ever exist in practice, as any decision is inevitably shaped by earlier decisions which have already been taken, and will always be subject to other constraints of one kind or another. In practice, therefore, any decision-making process requires an explanation of the constraints on involvement, including where associated decisions are no longer negotiable.

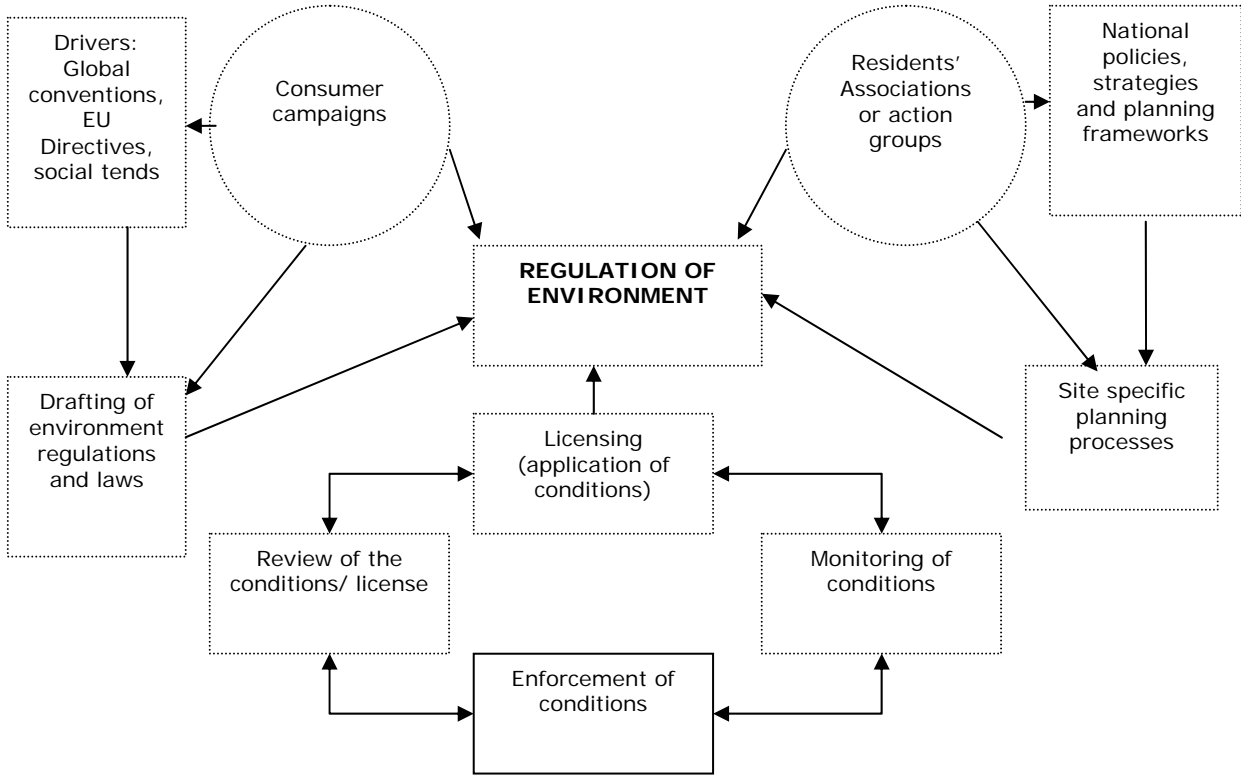
In the case of the regulatory regimes controlling discharges and emissions to the environment, decisions on licence applications come at a relatively late stage in a series of decisions which constrain the options that can be considered when granting or refusing a licence. European Directives, national legislation, regulations and technical standards will all have been formulated through earlier processes which in themselves are open to varying degrees of input from those with an interest in the decision. In most cases a decision will also have already been made by the planning authority to allow the applicant to build a facility at a particular location. Each of these earlier decisions must be respected and taken into account by the environmental regulator when considering the specific questions allocated to the phase of decision-making for which it is responsible.

Multiple legislative, policy and social drivers apply to these series of decisions, including, in terms of European environmental legislation, the Aarhus Convention, which requires that the goals of transparency, accountability and involvement are built into decision-making procedures and practices. In parallel with these legislative drivers for public involvement in decision-making, there is perceived to be an increasing public demand for higher standards of transparency and accountability in the way decisions are taken, including the right for members of the public to contribute to such decisions themselves (Richards & Smith 2003). Thus organisations are expected to be

increasingly open to the public gaze. This trend is reflected in SEPA's corporate guidance: its management statement, (Scottish Executive 2005); the Scottish Executive's Policy Priorities for SEPA (Scottish Executive 2004b) and its Statutory Guidance to SEPA on Sustainable Development (Scottish Executive 2004a). The Policy Priorities, for example, indicate that while SEPA has taken significant steps towards ensuring that the public has access to information in line with the UK's obligations under the Aarhus Convention regarding openness, there is scope for increasing public participation in its decision making.

The following diagram illustrates some of the relationships between these different levels of and influences on decision-making:

**Figure One: The Landscape of regulation: Opportunities for public involvement**



Opportunities for public input indicated by ....

Such a complex landscape, comprising types of legislation developed in different contexts, with differing objectives, and at different times, has led to a degree of variation in the way public involvement is provided for under different regulatory regimes. One of the objectives of the research project was therefore to identify and set out these variations, to consider whether there was a baseline for public involvement that would satisfy the separate requirements of different regimes.

This variation, whereby different regulations have slightly different procedures for public involvement, is one potential source of misunderstanding or frustration for the public seeking to be more involved in regulatory decision making. Three other frustrations were identified by the research. Firstly, when consultative or participatory

approaches have been used as part of regulatory decision-making, those involved may express a much broader range of concerns than can be considered under the given regulatory regime. For example, SEPA must grant a license if the application meets all the required conditions, whether or not the public thinks there is a need for this facility, or object to its location, as these issues must be considered within the local authority planning regime. The issues that can be considered are limited to pollution control techniques and environmental impact - in the words of an officer who worked on a Pollution Prevention and Control (PPC) application: *"if the representation is not covered by the regulations you can do nothing with it. These are 'I don't want it in my backyard'. 'I don't like it'. If it raises an issue that is within the regulations in terms of to do with best available techniques and impact then okay ..."*

Secondly, as the example highlights, consultations under the regulatory regimes, e.g. on a license application, are always shaped by previous decisions on the content of the regulations, emissions standards, the location of the plant, and so forth. These decisions may or may not have involved the public, but they cannot be overturned in the course of the consultation on the granting of the license. However, these constraints are not always recognised by those responding to consultations and this results in submissions from the public on issues that are unable to be considered at this particular stage of decision making.

Thirdly, these limited areas for input often require a specialist or technical understanding of industrial or environmental processes. Whilst the public have a range of competencies, including such experts acting in their capacity as local citizens, framing the consultation in terms of such particular expertise generally excludes the majority from being able to make a substantive response to the proposal. All four issues illustrate the tensions between the specific role of environmental regulation within a broader decision-making context, and the agenda for ensuring meaningful public involvement at all levels of decision-making.

### **Theories of Public Involvement**

Most literature on public involvement seems to focus on planning or policy processes (see for example, (Brown, Downie, & Elrick 2001; Holmes & Scoones 2000) rather than the implementation of regulations, which follow on from a series of prior planning and policy decisions. The majority of the available guidance on public involvement is therefore not appropriate for the regulatory context. The guidance is focussed on achieving three aims (substantive, instrumental, and normative<sup>1</sup>) of public involvement (Fiorino 1990). These aims all 'open up' the discussion to multiple perspectives with the implicit assumption that deliberation will improve the outcome. The opening up process requires sufficient time to ensure all views are heard and considered; and that different forms of knowledge are judged to be of value in the decision space. Whilst the process has to be closed down eventually, this should not occur until the substantive, instrumental and normative benefits have been accrued - see (Stirling 2006) on the problems with trying to close down a participatory process.

However, regulatory decisions are bounded by a series of previous decisions that set out the standards, environmental designations, chosen site, available technologies, etc., which cannot be re-opened at this stage. Furthermore, public involvement is also

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<sup>1</sup> These refer to (1) framing the problem; (2) getting agreement on the problem and the metrics for its solution and (3) developing capacity and encouraging active citizenship.

constrained by statutory time limits - for example, some water regimes allow 30 days for the decision to be made (including the period of advertisement), and the start is effectively determined by the operator, as it begins when the application is received.

These conditions create a problem with importing participatory approaches - see for example, (Wilcox 2003) or learning from experiences from developing plans and strategies. These latter approaches tend to emphasise the importance of allowing participants to shape the content to some extent, and therefore potentially have more flexible boundaries to decision making. They also suggest that the early involvement of interested parties is important to maximise their potential to influence the process. Theories of environmental decision-making also suggest that opening up processes to deliberation is appropriate for unstructured and uncertain problems. But given the constraints to opening up the process described in this paper, good practice in this case requires acknowledging the limits to public influence within regulatory regimes and focussing limited resources on delivering effective information and consultation processes.

**Table One: Choosing which rung of the ladder to work on for regulation**

Rungs on Ladder	
<b>Inform</b>	To support processes further up the ladder To explain the process of public involvement To explain decisions taken To educate about environmental regulation
<b>Consult</b>	To listen and get information to help make decisions: note this can also cover decisions about how to run public involvement processes; and how to manage ongoing monitoring of the regulated activity
<b>Co-decide</b>	More appropriate for planning approaches and development of legislation which set the scene for regulatory decisions
<b>Delegate</b>	Unlikely to be suitable for regulatory decision making
<b>Support</b>	Unlikely to be suitable for regulatory decision making

Blackstock *et al.*, (2006: 67 – 68, adapted from: OECD, 2004: 11)

## Research Findings

The paper now summarises the main findings of the research project in terms of helping SEPA to identify possible improvements in the manner in which it conducts its consultation processes, before drawing out the implications of these findings for both practice and theory. The findings are presented in three sections: the legal review; the review of current practice and the synthesis of the two.

### ***Summary of Legal Review***

The regulatory regimes require information to be made available to the public. Most regimes require the maintenance of public registers which can be kept in any form thought appropriate by the agencies<sup>2</sup>. The exception is the radioactive substances regime, which only requires the agency to keep records, although the regulations leave scope for this being exceeded. The other three areas (water, PPC and waste) provide guidance as to the content to be recorded in the register, including both the applications submitted and the decisions made, and thus provide for uniformity and

<sup>2</sup> Until recently, the legal requirement in terms of information provision was to keep a paper based public register, which for SEPA is held in four regional offices, with access available during office hours. Under the PPC amendments, provision is also made for the registers to be electronically available.

minimum content. These regulations are therefore flexible enough to allow good practice in provision of information to develop.

Each regime provides for consultation with statutory consultees, i.e. named organisations which must be contacted and given the opportunity to input during the consultation process. In some, but not all, regimes, the legislation may be interpreted in such a way as to provide for consultation with additional stakeholders identified by SEPA. Again, the regime covering radioactive substances seems the most restrictive, as the only statutory consultees listed are government bodies, though there is no actual prohibition on consulting others. Others, e.g. Water Environment and Water Services Act, are more open-ended, so the involvement of statutory consultees can expand beyond what is provided for in the legislation both in terms of who counts as a statutory consultee and in how they are consulted. The PPC and Waste Management regimes are more restrictive, but again do not expressly prohibit SEPA from exceeding the legislative requirements.

The water, waste and PPC regimes provide for public consultation through an opportunity for the public to submit written comments in response to an advertisement of the decision making process. Unlike the statutory consultees, who are to be notified directly of the decision-making process and asked for their input, the onus is on the public to remain vigilant and scan the public notices for the announcement that the consultation period has begun. The processes as described in these regulations are linear (advertise, gather submissions, decide) rather than iterative (advertise, discuss, amend, discuss, co-decide). The emphasis is on exchange of written information, and there is no legal requirement for other approaches such as face to face meetings or workshops. Furthermore, the radioactive substances regime does not explicitly provide for public consultation at all. However, in all cases, there are no specific legislative impediments to exceeding the minimum requirements.

SEPA's general obligations described above mean it may be appropriate to develop fuller procedures than are described in the legislation. However, the time limits within which decisions must be made may preclude the adoption of more participatory processes. In many cases if SEPA fails to meet the time limits it will be deemed to have refused the application (whether it is for a licence or permit to be granted, varied, transferred or otherwise.) As effective regulation is designed to enable the operator to function effectively, with minimal delays, so long as they are complying with all legal requirements, there is little scope to extend the time frame beyond what the applicant will agree to.

### ***Summary of Current Practice***

The findings were wide-ranging, so this paper highlights two areas for discussion: firstly, when and why statutory requirements were exceeded; and secondly, where the constraints affecting regulatory decision-making processes could be a barrier to public involvement. In order to maintain anonymity, we do not distinguish between SEPA respondents and those from other agencies, but indicate where the findings have led to recommendations for SEPA.

All respondents, from SEPA and other agencies, made reference to case studies which they felt exceeded statutory responsibilities (see table two below). The findings

illustrated that, in practice, there was flexibility in how the regulations were interpreted and implemented.

**Table Two: Respondents' perceptions of where they exceeded statutory duties**

<b>Regulation</b>	<b>Participatory Approaches above the legal minimum</b>
COMAH	Local community liaison group meetings
IPPC/PPC	Public meetings and drop in surgeries Stakeholder analysis and outreach Media and communications Strategy Website
EPA contaminated land	Public meetings and drop in surgeries Stakeholder analysis and outreach Media and communications Strategy
EPA waste management Licensing	Public meetings and drop in surgeries Stakeholder analysis and outreach Media and communications Strategy
National Waste Strategy	Public meetings and stakeholder consultations
Waste Regs (2005)	Public meetings and stakeholder consultations
UWWTD	Public meetings and drop in surgeries Stakeholder analysis and outreach Media and communications Strategy
CAR	Stakeholder analysis to expand list of consultees
Radioactive Substances Act	Multi-criteria decision making process with stakeholder panels Media and communications strategy Public exhibitions; focus groups; newsletters

In most cases, anticipated or actual conflict emerged as a catalyst for exceeding statutory requirements. Eight respondents noted that they felt it was essential to engage (generally face to face) where they believed that at least some members of the public were likely to contest the decisions being made. In some cases, the decision to exceed the legal minimum was made because conflict had already arisen surrounding the regulatory issue (granting or altering a licence) and greater public involvement was seen as the only way to try to resolve the problem. In other cases, conflict was expected (given what had happened in similar situations elsewhere) and so staff wished to provide information and opportunity for comment to make the consultation process as constructive as possible. All these respondents argued that conflict cannot be avoided but can be managed, and that conflict would emerge whether their agency consulted or not.

Four respondents noted that once a controversy erupts, it is almost impossible for the agency to recover control of the agenda and reverse the cycle of misinformation, mistrust and confrontation. Indeed, in the cases where conflict had already occurred, exceeding the legal minimum was no 'magic bullet' in that it took a great deal of time and effort to contain the public's frustrations and win back their trust. In two cases, respondents spoke of staff being harassed by angry members of the public; and three spoke about aggressive and antagonistic public meetings which left staff feeling unable to engage with the issues effectively. Our findings suggest that *anticipating* the 'trigger' for exceeding the legal minimum is essential to ensure that the appropriate response is made at the appropriate time, prior to the development of entrenched positions.

Respondents felt it was essential to clearly communicate the boundaries of the regulatory decision making process. Ten respondents explicitly raised the fact that the public did not understand the nature of the constraints on regulatory decision making processes. For example, one respondent said: *"often people comment and we can't do anything about it as it's not within our remit, there is often a lack of understanding. People often say to us, how can you make these rules up and we have to say that we didn't, the government sets the rules and we're the people who have to make sure they are followed, we don't make them. That's a common misconception"*. Eight respondents explicitly noted that any process must clearly communicate the extent to which the public can influence the decision and the criteria that can be considered in regulatory decisions.

Despite expressing the need to communicate these boundaries, only four respondents mentioned having explained the decision making criteria as part of the consultation process. When prompted about whether the public were informed about the regulatory decision-making process, five respondents explained the decision-making process to the interviewer but it seemed that only the decision, rather than the process of reaching it, was made available to the public. Four respondents argued that it was not current policy to explain decision-making processes<sup>3</sup>. One respondent, commenting on the situation when representations are seemingly ignored as their content cannot be considered as part of the regulatory decisions, said - *"and if they are not informed about it, and why should they know about the technicalities of it all, and the legislation that drives [the agency], then they will just experience that as frustration"*. Our findings suggest that it is important to communicate the boundaries to regulatory decision-making, so that the public can tailor their representations accordingly.

### ***Summary of the Synthesis between Legal and Interview Findings***

The findings show that there is no explicit barrier to exceeding the legal obligations. This is illustrated by the fact that the UK Atomic Energy Authority (UKAEA) appeared to be the most proactive regarding encouraging public involvement, despite operating under what appears to be the most restrictive regulatory regime. The UKAEA has developed a transparent, stakeholder-led multi-criteria process for some regulatory decisions. Therefore, the legal requirements pertaining to public involvement can be considered as a minimum standard rather than a restriction.

Any decision to exceed the minimum standards of public involvement must take into account four practical constraints: the time period allowed for decision-making; the criteria for decision-making; non-negotiable previous decisions, and information considered confidential for reasons of commercial sensitivity or national defence. However, there is nothing to prevent building better relationships between local communities/communities of interest and potential applicants so that all sides are alerted in advance of impending applications; have access to appropriate and understandable information; understand the areas where they can and should focus their comments and are therefore able to organise themselves to respond within these constraints. Thus, our findings illustrate that it is possible to work around these constraints to allow meaningful involvement in regulatory decision-making.

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<sup>3</sup> One interviewee was not prompted on this question.



However, the variety of approaches to exceeding the legal minimum is potentially problematic if 'effective regulation' should be predictable, transparent and consistent. Some respondents from other agencies used a corporate set of principles to guide their interaction with the public - see (Scottish Water 2004),(Environment Agency 2004). The majority of the SEPA officers interviewed were keen to place their practice within a similar corporate framework, sharing experiences between regions and regulatory regimes, and above all, avoiding the charge of implementing disproportionate measures compared to those required for other operators.

### ***Recommendations made to SEPA***

The conclusions arising from the report can be summarised in terms of purpose, context and process (Involve 2005). **Purpose** relates to the objective of public involvement. The findings suggest that actual or anticipated controversy was the catalyst for exceeding the minimal public involvement requirements. Unsurprisingly given the context for the research, the findings suggest an instrumental focus (see page 4) for public involvement which was focussed on efficient regulation (balancing public interest with an obligation to minimise the burden on applicants who comply with regulations). As a consequence, the report's recommendations focused on developing a consistent approach as to when and how to work beyond the statutory minimum requirements for public involvement, and the need to develop corporate principles which would help to guide such decisions.

**Context** refers to the historical, local and institutional conditions that affect processes, particularly the fact that those interviewed perceived that the public did not understand the boundaries of regulatory decision-making, or how they could effectively engage with the process. This led to recommendations focused on the need for further research on: how members of the public perceive regulatory decision making; to develop means of explaining the context of regulatory decisions more effectively; to share experiences internally; and to view public involvement as an ongoing relationship.

**Process** refers to the techniques used, the resources provided in terms of time and staff, public capacity to contribute to the process, and organisational culture. Processes need to be well planned, and the report highlighted the need to develop a resource explaining how to: select which techniques to use; how to ensure that decision-making is transparent; how to inform the public of decisions; and how to evaluate and learn from each experience. The recommendation was therefore that SEPA should develop a toolkit to support regulatory staff in achieving these aims, building on existing expertise and aiming to share it more widely.

### **Implications**

For SEPA, the recommendations of the report provide a framework for working to improve its consultation processes with the aim of making them more transparent and accountable, in line with its Vision for Regulation (see SEPA 2005). This framework consists of three principal elements: developing a set of corporate principles for public involvement; putting together a 'toolkit' to support regulatory staff responsible for statutory consultations, and working on additional support materials, such as clearer explanations of how regulatory regimes and consultation processes operate.

There are many potential benefits of carrying out these actions, such as greater recognition internally and externally of existing good practice in running consultations on regulatory decisions. In turn, this could lead to better transfer of good practice within the organization, including between regulatory and non-regulatory decision-making contexts. They should also lead to better connections between public involvement and other aspects of regulatory decision-making, by encouraging a greater focus on what public involvement can distinctively contribute to the process, and how best to enable people to provide effective input. Likewise, there are opportunities for ensuring greater consistency and transparency in how public involvement is handled, so that it is clearer to SEPA staff, operators and members of the public how, when and why particular forms of involvement are to be used.

In terms of contributing to literature on public involvement, the paper illustrates the importance of interpreting what might constitute 'good' practice in the light of the *context* of public involvement. This research on public involvement in regulatory regimes has highlighted how aspirations to work at higher rungs of Arnstein's ladder, and to involve the public early in the decision-making process, may not be appropriate in all cases.

This does not mean that the principles of meaningful public involvement be abandoned. On the contrary, this paper argues that more attention should be paid to how to do meaningful work at the lower rungs, which can provide a foundation for more participatory activities. Outreach processes can help to develop capacity which can be used in more participatory processes in the future. Furthermore, clarifying the limits to public influence within regulatory decisions helps to avoid the negative cycle of distrust, whereby the public feel that their input to consultation was ignored, making them less likely to input to other processes.

As Figure One illustrates, environmental decision making is in fact a series of decisions about the shape and content of regulatory regimes, environmental policies, local plans, application of local plans and implementation of policies and regulations. These stages vary in the extent to which deliberation is enabled and encouraged. For example, time periods for amending legislation or emission standards are more generous (usually three months); the criteria for planning decisions (on the need for, and location of, the activity) are generally more open than for the regulatory decision; and these process are often more participatory, or at least flexible, in terms of allowing greater deliberation of the issues.

Thus, we suggest that approaches to public involvement in regulatory regimes needs to be set in a broader decision-making context. If the public better understands the boundaries on involvement in regulatory decisions, this can help them decide where to direct their energy in future. It may be that putting time and resources into explaining the boundaries and constraints to regulatory decisions, and illustrating which other decisions are more open and therefore amenable to deliberation, may actually improve opportunities for public involvement.

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## **Appendix One: Specified Scottish\* Regulatory Regimes**

- Water Environment and Water Services (Scotland) Act 2003
- Controlled Activities (Scotland) Regulations 2005
- Pollution Prevention and Control (Scotland) Regulations 2000
- Landfill (Scotland) Regulations 2003
- Radioactive Substances Act 1993
- Control of Major Accident Hazards Regulations 1999
- Environmental Protection Act 1990:
  - Part I: Integrated Pollution Control and Air Pollution Control
  - Part II: Waste on Land:
    - Waste Management Licensing
  - Part IIa: Contaminated Land
  - Contaminated Land (Scotland) Regulations 2000
- Nature Conservation (Scotland) Act 2004
- Environment Act 1995:
  - Part IV: Air Quality
  - Part V: National Waste Strategy
- Environmental Assessment (Scotland) Act 2005
- Environmental Impact Assessment (Scotland) Regulations